IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06/04/2004

CORAM

THE HONOURABLE MR. JUSTICE V. KANAGARAJ
AND
THE HONOURABLE MRS. JUSTICE R. BANUMATHI

CRIMINAL APPEAL No.32 OF 1997

1. Chinna Thambi
2. Nadimuthu .....Appellants /
Accused 1 and 2

-Vs-

State By Inspector of Police,
Adhiramapattinam Police Station,
Adhiramapattinam. .....Respondent

Criminal Appeal, under Section 374(2) of Criminal Procedure Code against the judgment dated 07.11.1996 passed by the learned Principal Sessions Judge, Thanjavur in S.C.No.73 of 1996, as stated therein.

!For Appellants :: Mr. A. Natarajan

^For Respondent :: Mr. E. Raja
Additional Public Prosecutor

:J U D G M E N T
(Judgment of the court was delivered by R.BANUMATHI, J)

The appellants are accused 1 and 2 in S.C.No.73 of 1996 on the file of Principal Sessions Court, Thanjavur. By the judgment dated 07.11.1996, learned Principal Sessions Judge, Thanjavur convicted the appellants / accused 1 and 2 under Sec.302 read with Sec.34 of I.P.C and sentenced each of them to undergo Life Imprisonment. By the same judgment, for causing the evidence to disappear, the appellants were also convicted under Section 201 of I.P.C., for which, the appellants were sentenced to undergo Rigorous Imprisonment for four years.

2. The case of prosecution could briefly be stated thus:
One Mala was married to one Dhanabal and she gave birth to a male child. Thereafter she was deserted by the said Dhanabal. Subsequently, Mala developed intimacy with A-1-Chinnathambi. Later, the said Mala is said to have had illicit intimacy with the deceased Kulandaivelu, much to the disliking of A-1-Chinnathambi. A -1-Chinnathambi warned Mala to desist from that intimacy, for which Mala refused to oblige due to which, A-1-Chinnathambi

developed grudge against Kulandaivelu and hatched a plan with A-2-Nadimuthu, who is a close friend of A-1, to do away with Kulandaivelu.

3. On 13.05.1994, at about 06.00 p.m., the deceased Kulandaivelu had hired a cycle from the cycle shop of P.W.10-Srinivasan. A-1 and A-2 are alleged to have taken Kulandaivelu with them. On the same day, at about 10.30 p.m., near Pillaiyar Temple at South Mannankadu, P.W.3 - Marimuthu had noticed A-1-Chinnathambi, A-2-Nadimuthu and deceased Kulandaivelu with a cycle. P.W.3-Marimuthu flashed a torch light and saw them proceeding.

4. On 13.05.1994, at about 11.00 p.m., P.W.4-Periyasamy went near Adampudi Odai bund to answer the calls of nature and at that time he saw A-1-Chinnathambi carrying a gunny bag on his head and A-2Nadimuthu going along with him towing a cycle.

5.Complaint by Village Administrative Officer: On 16.05.1994 at about 11 a.m., P.W.1-Govindasamy, Village Administrative Officer, was informed about a dead body being buried in a gunny bag at Adampudi Odai eastern bund. On the same day, P.W.1-Govindasamy sent Ex.P.1Complaint to the Sub-Inspector of Police, Athirampattinam Police Station, stating about the burial of the dead body in a gunny bag at Adampudi Odai eastern bund.

6. Registration of case: On the basis of Ex.P.1-complaint dated 16.0 5.1994, P.W.16-Jameen, Sub-Inspector of Police, Athirampattinam registered a case in Crime No.275 of 1994 under Sec. 302 I.P.C on 16.05.19 94. The express report was sent to the concerned officers, including P.W.11-Chinnappa, Executive Magistrate and Tahsildhar of Pattukkottai.

7. Exhumation and Inquest: On receipt of the copy of the First Information Report, P.W.11-Executive Magistrate and Tahsildhar of Pattukkottai came to the spot- Adampudi Odai bund along with P.W.12-Dr. Sarojini (to conduct spot autopsy). The place where the body was dug was inspected. As per the directions given by P.W.11-Executive Magistrate and Tahsildhar, P.W.7-Rajendran, dug the place. P.W.11 disinterred the body and held inquest over the same. Witnesses were examined and their statements were recorded. P.W.6-Rangasamy-father of the deceased, P.W.2-Thamilselvi- sister of the deceased and the above said Mala were examined during the inquest. The dead body was in a highly decomposed stage, but able to be identified as that of Kulandaivelu. P.Ws.2 and 6 have identified the decomposed body as that of Kulandaivelu. The body of the deceased was found to be strangulated with a towel on its neck. Ex.P.11 is the Inquest Report.

8. Post Mortem: Pursuant to the requisition from P.W.11-Executive Magistrate and Tahsildhar, P.W.12-Dr.Sarojini has conducted spot autopsy. The body, which was in a highly decomposed stage, found packed in a gunny bag, but able to be identified as that of Kulandaivelu with shortening of leg, deformity found in the left leg. There is overriding of 4th toe over the third in the left side leg. Skin peeled off from the body. Foul smelling maggots found flying. There is towel found around the neck. Not able to

identify the external injury. Fracture of left Hyoid was noted. Viscera was sent for chemical analysis. After the receipt of Viscera, P.W.12-Dr.Sarojini gave opinion, opining that the deceased would have died of asphyxia due to strangulation.

9. Further Investigation: In Ex.P.11-Inquest Report dated 23.05.1994 , P.W.11-Executive Magistrate and Tahsildhar of Pattukkottai expressed his opinion on the suspicious death of Kulandaivelu. Hence, P.W.17 -Kandasamy-Inspector of Police had taken up the further investigation. He has prepared Ex.P.5-Observation mahazar dated 16.05.1994 at the scene of occurrence. M.O.9-photograph of Kulandaivelu was seized. After exhumation and other proceedings, M.O.3-Lungi, M.O.5-Towel, M.O.13-Brief and M.O.6-Waist cord were seized by P.W.17-Inspector of Police under Form 95.

10.Arrest of the accused:A-2-Nadimuthu was arrested on 22.05.1994 at about 03.00 p.m., near Thuvarangurichi Road Junction in the presence of P.W.9-Govindasamy and P.W.8-Raman. When A-2-Nadimuthu was interrogated, he had voluntarily given a confession statement. Ex.P.2 is the admissible portion of the said confession statement. On the same day, at about 06.00 p.m., A-1-Chinnathambi was also arrested in Pattukkottai bus stand. Both A-1-Chinnathambi and A-2-Nadimuthu were sent to judicial custody on 23.05.1994. On completion of the investigation, charge sheet was filed against the accused under Sec.302 I.P.C read with Sec.34 I.P.C and Sec.201 I.P.C.

11. Recovery of the material objects: Pursuant to the confession statement given by A-2-Nadimuthu, M.O.1-cycle was recovered from Adampudi Odai bund under Ex.P.3-seizure mahazar. On being identified from behind the house of A-1-Chinnathambi, M.O.2-Spade was seized under Ex. P.4-seizure mahazar, in the presence of the above said witnesses.

12. To substantiate the charges against the accused in the trial court, P.Ws.1 to 17 were examined. Exs.P.1 to 18 were marked. M.Os.1 to 13 were produced. When the accused were questioned under Section 31 3 Crl.P.C., about the incriminating circumstances and evidence, denying all the charges, the accused stated that a false case is foisted against them.

13. Upon consideration of the evidence and the defence version, learned Principal Sessions Judge, Thanjavur found that due to previous enmity, A-1-Chinnathambi and A-2- Nadimuthu strangulated the deceased Kulandaivelu with M.O.5-Towel and caused the death. It was further held that accused 1 and 2 were proved to have caused disappearance of evidence in Adampudi Odai Erikkarai. On those findings, the appellants / accused 1 and 2 were found guilty, convicted and sentenced them to undergo Life Imprisonment as aforesaid in para (1).

14. Learned counsel Mr. A.Natarajan, appearing for the appellants / accused, contended that the prosecution has not firmly established the circumstances. Submitting that the evidence on motive aspect and the scene of occurrence are absolutely wanting, learned counsel further contended that there was an enormous delay of nearly one week in sending the inquest report

and that the statements of key witnesses like P.W.3-Marimuthu and P.W.4-Periyasamy, which was not properly appreciated by the trial court. The arrest of the accused and recoveries of M.O.1-cycle and M.O.2-spade are also assailed contending that they do not in any way establish the complicity of the appellants / accused in the offence.

15. Countering the arguments of the appellants / accused, Mr. E. Raja, learned Additional Public Prosecutor submitted that the trial court has well appreciated the evidence on the circumstances adduced by the prosecution and that the reasonings for conviction are based on the materials available on record. Learned Additional Public Prosecutor further submitted that Ex.P.11-Inquest Report dated 23.05.1994 sufficiently establishes the motive aspect. He has also submitted that there is no strong reason warranting interference by this Court.

16. Upon careful reassessment of the evidence, impugned judgment and the submissions of both sides, the following points arise for determination in this appeal:
(1) Whether the prosecution has conclusively established the circumstances?
(2) Whether the guilt of the appellants / accused 1 and 2 is proved beyond reasonable doubt?
(3) Whether the trial Court was right in finding that the circumstances are completely established pointing to the guilt of the accused?
(4) Whether the conviction of the appellants could be sustained?

17. Identification of the dead body as Kulandaivelu:
The dead body was highly decomposed, but was able to be identified as that of Kulandaivelu. P.W.6 and P.W.2, father and sister of the deceased identified the dead body as that of Kulandaivelu. The deceased Kulandaivelu was having deformity and shortening of leg. In their evidence, P.Ws.2 and 6 have clearly spoken to about the deformity of the left leg of Kulandaivelu. The gist of their evidence is as follows:
",lJ fhy; Cdk;/ mij itj;J ehd; milahsk; fhz;gpj;njd;/ ,lJ fhy; tpuy;fs; Nk;gp ,Uf;Fk;/ nkYk; tpuy;fs; xd;W nky; xs;W gpd;dpaJ nghy; ,Uf; Fk;."

18. P.W.12-Dr.Sarojini has also noted the said deformity, that is, overriding of fourth toe over the third in the left side leg. Thus, the identity of Kulandaivelu is clearly brought out by the deformity of the left leg.

19. Identification of the exhumed body is proved to be that of Kulandaivelu by scientific evidence also. For identifying the body, skull was preserved for Super Imposition Test. P.W.12-Dr.Sarojini had preserved the skull of the deceased Kulandaivelu for being sent to Super Imposition Test to the Forensic Science Laboratory, Chennai. Pursuant to Ex.P.15-requisition from the Inspector of Police, the skull was sent along with M.O.9-photograph to establish the identification of the deceased Kulandaivelu scientifically since the body of the deceased was disinterred after six days of burial. The image of the skull and face photograph were subjected to Electronic Skull

Identification Device by Video for superimposing the images of the skull and the face photograph. The image of the skull when superimposed with the image of the above face it was observed that the face and skull outlines were found to be in agreement, together with the anthropometric land marks on them. The scientific officer issued Ex.P.17, Super Imposition Test Report, opining that the skull item could have belonged to the male individual in M.O.9-Photograph-that is Kulandaivelu. Thus, the identity of the disinterred body is convincingly established as that of Kulandaivelu.

20. Homicidal Death: The dead body was found buried, packed in a gunny bag in a hidden place near Adampudi Odai kilkkarai. There was fracture of left horn of Hyoid. Even at the time of exhumation, P.Ws.11 and 12 noted that the neck of the deceased was tightened with M.O.5towel. P.W.12-Dr.Sarojini was subjected to elaborate crossexamination by the defence. She stuck to her position that Hyoid bone fracture was antemortem in nature. The death of deceased Kulandaivelu is thus proved as Homicidal by the unimpeachable evidence of P.W.12-Dr. Sarojini and the manner in which the body was buried packed in a gunny bag.

21. But, the main point for consideration is whether A-1, Chinnathambi and A-2, Nadimuthu are proved to be responsible for the Homicidal death of Kulandaivelu?

22. Even at the outset, we may point out that there is no direct evidence for the occurrence; the case of prosecution is based upon only the circumstantial evidence. To bring home the guilt of the accused, the prosecution relies upon the following circumstances:
(1) Motive - that the deceased Kulandaivelu developed intimacy with Mala, much to the disliking of A-1-Chinnathambi ;
(2) on 13.05.1994 at about 10.30 p.m., the deceased Kulandaivelu was last seen alive in the company of the accused. (evidence of P.W.3Marimuthu)
(3) on 13.05.1994 at about 11 p.m., P.W.4-Periyasamy saw A-1Chinnathambi carrying a gunny bag on his head and A-2-Nadimuthu towing the cycle.
(4) Arrest of A-2-Nadimuthu at about 03.00 p.m., on 23.05.1994; recovery of M.O.1-cycle said to have been taken on hire by the deceased Kulandaivelu from the cycle shop of P.W.10 and also recovery of M.O.2-spade.
It is to be seen whether the evidence adduced by prosecution in support of the above circumstances are firmly established unerringly pointing to the guilt of the appellants / accused.

23. Before adverting to the evidence adduced by the prosecution, we may point out the serious lacuna on the part of the investigation in investigating the scene of occurrence. The case of the prosecution is that the deceased Kulandaivelu has been strangulated with M.O.5towel by A-1-Chinnathambi and A-2-Nadimuthu near Adampudi Odai bund, but the evidence is absolutely found to be wanting on the scene of occurrence. Ex.P.10-the plan prepared by P.W.11-the Executive Magistrate and the Tahsildhar refers only to exhumation spot and not the scene of occurrence. Likewise, Ex.P.6-observation mahazar prepared by P.W.11-the Executive Magistrate and the Tahsildhar also refers only to the place of exhumation and not the scene of

occurrence. The lack of evidence on the scene of occurrence creates serious dent in the prosecution case and in the investigation.

24. In the above backdrop, let us consider the evidence adduced by the prosecution towards establishing the circumstances.

25. Circumstance 1 - Motive:
Prosecution case is that one Mala was married to one Dhanabal and gave birth to a male child. Thereafter, she was deserted by the said Dhanabal. Further case of the prosecution is that the said Mala was having illicit intimacy with A-1-Chinnathambi and later developed intimacy with Kulandaivelu much to the disliking of A-1- Chinnathambi. It is also the case of the prosecution that A-1-Chinnathambi warned Mala to desist from Kulandaivelu, for which she did not oblige, due to which A-1-Chinnathambi developed grudge towards the deceased Kulandaivelu. It is to be noted that the best person to speak about the motive aspect would be the said Mala; but she was not examined during the investigation by P.W.17. The said Mala was examined by P.W.11Executive Magistrate and Tahsildhar during the inquest, with whom the said Mala stated as under:
".....Mdhy; fle;j fhy eltof;iffis bfhz;L jpUnt';flk; njhg;gpy; trpj;J te;j rpd;djk;gp kPJ re;njfg;gLk;go cs;sJ vd;gij bjhptpj;Jf;bfhs; fpnwd;/////////////// Mfnt. ,we;J nghd FHe;ijntYtpd; bfhiyf;F rpd;djk;gp xU fhuzfh;j;jhthf ,Ug;ghnuh vd re;njfpf;Fk; epiyapy; cs;sJ".

26. Thus, Mala seems to have expressed only doubt about the complicity of A-1,Chinnathambi in the death of Kulandaivelu. That statement of Mala before P.W.11-Executive Magistrate and Tahsildhar cannot be said to have established the motive aspect for two reasons viz.,(i) that the statement before P.W.11-Executive Magistrate and Tahsildhar is not the substantive evidence; and (ii) the statement of Mala is purely based upon her surmise and not a definite piece of evidence.

27. In their evidence, P.Ws.2 and 6-sister and father of the deceased respectively have not stated anything about the illicit intimacy of Kulandaivelu with Mala. Only P.W.5-Balaiyan, brother-in-law of the deceased has made a mention of such relationship of Kulandaivelu with Mala. That casual statement of P.W.5-Balaiyan, who is brother-inlaw of the deceased Kulandaivelu, in our view, is hardly sufficient to establish the motive.

28. Hardly, there is any action without motive where the case of prosecution is based on the evidence of eye witnesses, the existence or non-existence of motive, sufficiency or insufficiency will not play a major role as in the case based merely on circumstantial evidence. In cases of circumstantial evidence, proof of motive is a material consideration. Absence of proof of motive should be regarded in favour of the accused. This being the case of circumstantial evidence, in our view, absence of proof of motive adversely affects the prosecution case.

29. Circumstances 2 & 3:
According to P.W.3-Marimuthu, on the night of 13.05.1994 at about 10 .30 p.m., near Pillaiyar Temple at South Mannankadu, he noticed A-1,

Chinnathambi, A-2, Nadimuthu and deceased Kulandaivelu with a cycle, where they were talking and proceeding. P.W.3-Marimuthu is alleged to have seen them flashing the torch light. The trial court accepted the evidence of P.W.3 and found that the said circumstance was established. In our view, the trial court was not right in accepting the evidence of P.W.3-Marimuthu without testing the same for its reliability.

30. P.W.3-Marimuthu is said to have seen the accused proceeding along with Kulandaivelu on the night of 13.05.1994 at about 10.30 p.m. If really, he had seen them going on the said day, he would have disclosed the same immediately to P.W.11-Executive Magistrate and Tahsildhar when the exhumation was taken up on 16.05.1994. But, P.W.3Marimuthu has not come forward to state before P.W.11-Executive Magistrate and Tahsildhar what he had seen on the night of 13.05.1994. He was examined by P.W.17-Inspector of Police on the night of 16.05.1994 and his statement under Section 161(3) Crl.P.C. was recorded only on 16.05.1994. The said statement was received in the court with much delay only on 23.05.1994. This throws serious doubts on the evidence of P.W.3, which was not taken note of by the learned Principal Sessions Judge, Thanjavur.

31. P.W.4-Periyasamy is alleged to have seen A-1, Chinnathambi on the night of 13.05.1994 carrying a gunny bag on his head and A-2, Nadimuthu going along with him by towing a cycle. Likewise in the case of P.W.3-Marimuthu, P.W.4-Periyasamy has not come forward to disclose what he had seen on the night of 13.05.1994. His statement was also recorded on 16.05.1994 and there was delay in sending the same to the court. The delay in the receipt of statement of P.W.4-Periyasamy also throws doubt on his evidence and the reliability of P.W.4-Periyasamy. With the evidence of P.Ws.3 and 4, the prosecution cannot be said to have established that the deceased Kulandaivelu was last seen along with the company of the accused.

32. Circumstance 4:
A-2, Nadimuthu was arrested on 22.05.1994 at about 03.00 p.m., near Thuvarangurichi Road Junction in the presence of P.W.9-Govindasamy and P.W.8-Raman. On the basis of confession statement of A-2, Nadimuthu, M.O.1-Cycle was recovered near Adampudi Odai bund under Ex.P.3Mahazar dated 22.05.1994. Further, from behind the house of A-1, Chinnathambi, M.O.2-Spade, said to have been used for digging the pit was seized under Ex.P.4-Mahazar dated 22.05.1994.

33. The prosecution heavily relies upon the recovery of M.O.1-Cycle at the instance of A-2, Nadimuthu. The case of prosecution is that the deceased Kulandaivelu had hired the M.O.1-cycle from the cycle shop of P.W.10-Srinivasan, who is running a cycle shop in Madukkur. In his evidence, P.W.10-Srinivasan has stated that M.O.1-cycle-Number-10 belongs to his cycle shop. Ex.P.7 is the Register maintained in the cycle shop of P.W.10-Srinivasan. Referring to Ex.P.8-entry made in Ex.P.7-Register, P.W.10-Srinivasan has stated that the deceased Kulandaivelu had taken the cycle on hire from his cycle shop on the evening of 13.05.1994 and he has not returned the cycle. In our view, the evidence of P.W.10-Srinivasan does not conclusively establish taking of cycle by deceased Kulandaivelu.

34. Admittedly, P.W.10-Srinivasan was not available in the cycle shop on 13.05.1994 and he has no personal knowledge about the hiring of cycle by Kulandaivelu. Only the employees, engaged by P.W.10 as in charge of the shop were available on 13.05.1994. Thus, the evidence of P.W.10-Srinivasan is only limited to the extent of the entry in the Register - Ex.P.8. The employees in charge of the cycle shop on 13.05 .1994 were not examined to establish that only the deceased Kulandaivelu had hired the cycle on 13.05.1994. That apart, we may also point out that the statement of P.W.10-Srinivasan though said to have been recorded on 23.05.1994, the same was received by the Court only on 1 7.05.1995 when the charge sheet was filed. In our view, no implicit reliance could be placed upon the evidence of P.W.10-Srinivasan to connect M.O.1-cycle with the deceased Kulandaivelu.

35. In case of circumstantial evidence, the prosecution has to establish :
(i) Circumstances from which the conclusion of guilt is drawn;
(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say that the circumstances should be of conclusive nature and tendency pointing out to the guilt of the accused ;
(iii) The circumstances taken jointly should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else ;

36. On a careful consideration of the evidence adduced by the prosecution, we find that the circumstances are neither firmly established nor do they conclusively point to the guilt of the accused. On the basis of evidence and materials made available on record, in our considered view, it would be unsafe to convict the appellants. Hence, we are of the view the conviction of the appellants / accused 1 and 2 cannot be sustained.

37. For the reasons stated above, the judgment of Principal Sessions Judge, Thanjavur in S.C.No.73 of 1996 dated 07.11.1996, convicting the appellants / accused 1 and 2 under Sec.302 read with Sec. 34 of I.P.C and Sec.201 of I.P.C is set aside and the appeal is allowed. The appellants / accused 1 and 2 are acquitted of all the charges and they are set at liberty forthwith.

Index: Yes
Internet: Yes

Dpn/-

Copy to:
1. The Principal Sessions Judge,
Thanjavur.

2. The Superintendent,
Central Prison,

Trichy.

3. The Inspector of Police,
Adirampattinam Police Station,
Thanjavur District.

4. The Public Prosecutor,
High Court, Madras.